G. VADIVELOO

v.

THANALETCHUMY VELOO & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA THAMBY CHIK J
[ORIGINATING MOTION NO. 17-32 OF 1990]
4 MAY 1991

LEGAL PROFESSION: *Complaint against advocate and solicitor - Disciplinary committee hearing - Complainant absent although notified - Dismissal of complaint - Complainant re-filed complaint on advice contained in dismissal order - Another disciplinary committee appointed - Order of suspension made - Appeal - Jurisdiction - Validity of order of suspension - Functus officio - First order filed and served on relevant parties - Proper appeal procedure - Legal Profession Act 1976, ss. 95, 99, 101(3),(4) and 102 (1).*

In December 1987, a disciplinary committee, DC1, was constituted under s. 99 of the Legal Profession Act 1976 (the Act) for the hearing of a complaint lodged by the complainant T against the appellant, V, an advocate and solicitor. At the hearing, T was absent although she was notified of the date, time and place. V submitted that the complaint should be dismissed as the matter had been outstanding for a long time. DC1 dismissed the complaint and in their order dated 22 February 1988, T was advised to file a fresh complaint if she wished to pursue the matter.

This order made by DC1 was filed and served on the relevant parties as specified in s. 101(3) and (4) of the Act.

T lodged another complaint and a disciplinary committee, DC2, was appointed to rehear the matter. DC2 made an order on 22 August 1990, suspending V from practising as an advocate and solicitor for 6 months. This is V's appeal against the decision of DC2.

Held:

[1] As the order dated 22 February 1988 was duly filed and served on the relevant parties under s. 101(3) and (4) of the Act, there had been full compliance with the Act - as the order had not been set aside or reversed, it was still subsisting.

[2] Having dismissed the complaint for want of prosecution, DC1 became *functus officio* and the advice to T to file a fresh complaint was wrong advice which could not be treated as part of this order.

[3] The correct procedure was for T to lodge an appeal under s. 102(1) of the Act - no such appeal was lodged and neither was there evidence to show that T had filed another complaint or a fresh one under s. 95 of the Act.

[4] The Bar Council's application for the appointment of DC2 to rehear the same complaint was not valid as it had not acted according to law. Therefore, DC2 had no jurisdiction to adjudicate and determine the complaint as its appointment was based on an invalid application.

[Appeal allowed.]

Legislation referred to:
Legal Profession Act 1976, ss. 95, 99, 101(3), (4), 102(1)

For the appellant - Joginder Singh (R.C. Nathan & V. Vijendran with him); M/s. Joginder Singh & Co.
For the respondent - Karpal Singh; M/s. Karpal Singh & Co.
For the Malaysian Bar - B.K. Sethu (Radhakrishnan, Maid Zura with him)

JUDGMENT

Faiza Thamby Chik J:

This is an appeal by way of an originating motion by an advocate and solicitor (hereinafter referred to as "the appellant") against the findings and order of the disciplinary committee comprising Mr. Tara Kumar Sen (Chairman), Mr. K. Sothinathan and Mr. Yeoh Poh San (hereinafter referred to as "D.C. No. 2") appointed on 26 September 1988 and constituted under s. 99 of Legal Profession Act 1976 (the Act) made on 22 August 1990, whereby it was ordered that the appellant be suspended from practice as an advocate and solicitor in the States of Malaya for a period of six months and pay costs of RM2,000 to the complainant/ respondent Thanaletchumy a/p Veloo. The allegations made against the appellant before the committee and which the committee found to be substantiated were that he had acted as a solicitor for the respondent and that his conduct was unbecoming and unbefitting that of an advocate and solicitor and that he had committed a breach of his professional duty.

The following facts are elicited from the decision of the disciplinary committee:

(i) The complainant wanted to buy a piece of property in 1984 and went through one T.P. Chellian and was introduced to a piece of property known as Lot 86, Taman Dato' Hormat, Sg. Way, Selangor (hereinafter referred to as "the said property").

(ii) The said property was registered in the name of one Kothandabuni s/o Ramasamy (hereinafter referred to as "the vendor").

(iii) When the complainant wanted to buy the said property, Chellian told her that she would have to go to see Mr. G. Vadiveloo, that is, the appellant, and that Mr. G. Vadiveloo was the lawyer in charge and would handle everything.

(iv) Three payments were made by the complainant on three occasions at the office of Mr. G. Vadiveloo;

(a) a sum of RM2,000 paid on 16 May 1984 in cash for which a temporary receipt in the name of Vadiveloo & Company was issued; the sum of RM2,000 was also subsequently banked into the client's account of Mr. G. Vadiveloo;

(b) a sum of RM18,000 (RM8,500 cash and RM9,500 bank draft) was paid on 5 June 1984; a receipt was issued by the vendor which receipt was prepared by Mr. G. Vadiveloo's clerk one Soosay Mary d/o Anthonysamy. The bank draft for RM9,500 was banked into Mr. G. Vadiveloo's client's account;

(c) a sum of RM10,000 was paid on 12 November 1984 and the vendor signed a receipt again prepared by the abovenamed Soosay Mary.

(v) The complainant says that after paying RM30,000, Mr. G. Vadiveloo was to prepare a sale and purchase agreement; this Mr. G. Vadiveloo denies.

(vi) A sale and purchase agreement was not executed and subsequently the complainant did not wish to purchase the said property.

(vii) The vendor said that he was prepared to refund the complainant's money only if he could sell the said property.

(viii) The complainant went to see Mr. G. Vadiveloo on several occasions but when she did not receive any refund of her money, she resorted to legal recourse including complaining to the Bar Council.

Prior to this, another disciplinary committee comprising Mr. Ooi Boon Leong (chairman), Cik Hendon bt. Hj. Mohd and Datin Saraswathy Devi was appointed by the Chief Justice in December 1987 (hereinafter referred to as "D.C. No. 1") to hear the same complaint by the same complainant/respondent. Before D.C. No. 1 at an hearing held on 4 August 1988, the appellant was present but the complainant/respondent was absent. There the appellant submitted that the complaint should be dismissed on the grounds that the matter had been long outstanding since before March 1987 and that a hearing previously fixed had been adjourned because solicitors for the complainant had just been retained and had now been discharged and that it would be unjust to the appellant to have the matter hanging over him for such a long time. All the members of the committee agreed with the submission of the appellant and dismissed the complaint. The last paragraph of the order of D.C. No. 1 dated 22 August 1988 reads:

> When the members of the committee were on their way out of the building they saw the complainant and others. The committee members asked the complainant to give a statement why she was not at the hearing at the time fixed. The complainant admitted receiving (and produced) the notice dated 26 July 1988 giving notice of the hearing and the venue. She was advised to file a fresh complaint if she wished to pursue this matter further.

And this order was dated 22 August 1988.

It is not disputed that the order dated 22 August 1988 was filed with the Bar Council and the Registrar of the High Court pursuant to s. 101(3) of the Act and copies of the order were served by the Bar Council on the Chairman and the secretary of the Selangor and Federal Bar Committee, the complainant and the appellant pursuant to s. 101(4) of the Act on 6 September 1988. And s. 101(3) of the Act stated:

> Every order of the disciplinary committee shall be filed with the Bar Council and with the Registrar within three months of the date of the disciplinary committee is appointed or within such longer period as the Chief Justice on the application of the disciplinary committee may in writing specify and every such order shall be acted upon by the Malaysian Bar and the Registrar and be enforceable in like manner as a judgment or order of the High Court.

And it is plain from the facts of the case that this order of 22 August 1988 which "shall be enforceable in like manner as a judgment or order of the High Court" had not been set aside or reversed. That order complies with s. 101(4) of the Act which states:

> A copy of the order of the disciplinary committee shall forthwith be served by the Bar Council upon the advocate and solicitor in question and upon the person by whom the complaint was made or information referred and where the address of the advocate and solicitor or of the person to be served is unknown, publication in the national English and Malay language newspapers of the effect of the order shall be deemed to be good and sufficient notice of the copy of the order.

Therefore I am of the opinion that, that order dated 22 August 1988 is for that reason still subsisting. With reference to the last paragraph of that order which I had adverted to earlier on, especially the words "she was advised to file a fresh complaint if she wished to pursue this matter further" remained an advice albeit a wrong one for having made the order

dismissing the complaint for want of prosecution, the D.C. No. 1 became *functus officio* and whatever were said after dismissing the complaint could not by any stretch of the imagination be treated as part of that order.

The correct advice in the circumstances of the case is for the complainant to lodge an appeal under s. 102(1) of the Act which states:

> An appeal against any decision made by the disciplinary committee on the application or complaint under this Act shall lie to the High Court at the instance either of the applicant or the advocate and solicitor against whom the complaint is made.

There was no such appeal lodged against the dismissal of the complaint by the D.C. No. 1. Neither was there evidence or record to show that the complainant had filed another complaint or a fresh one under s. 95 of the Act. The appellant's Counsel said there was indeed no fresh complaint lodged by the complainant.

From the evidence on record, it is plain that the Bar Council had acted on the same complaint as that which had been dismissed by D.C. No. 1 whose decision had been filed under s. 101(3) of the Act with the Bar Council and the Registrar, and served on all the relevant parties as provided for under s. 101(4) of the Act. There was no appeal against the order made by the D.C. No. 1 as provided for under s. 102 of the Act and hence the complaint was disposed of. When the Bar Council acted on the same complaint in making its application to the learned Chief Justice to appoint a new disciplinary committee (D.C. No. 2) to rehear that same complaint it had then not acted according to law. The application is invalid. As a result, D.C. No. 2 has no jurisdiction to adjudicate and determine the complaint as its appointment is based on an invalid application.

I allow the appeal. There shall be no order as to costs.

Also found at [1991] 2 CLJ 1517